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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ERIC EDWARD LENNON,
THOMAS WILLIAM BROOK, BRYAN DAVID HAYNES,
and DOUGLAS JAY HULSLANDER

Appeal 2010-005996
Application 10/694,153^{1,2}
Technology Center 1700

Before CHUNG K. PAK, CHARLES F. WARREN, and
ROMULO H. DELMENDO, *Administrative Patent Judges*.

PAK, *Administrative Patent Judge*.

¹ Application 10/694,153 (Application '153), filed on October 27, 2003.

² The subject matter recited in the appealed claims in this Application '153 is related to the subject matter appealed in *Ex parte Haynes* (B.P.A.I. Appeal No. 2008-3926, Application No. 10/325,140 decided on August 26, 2008) and *Ex parte Haynes* (B.P.A.I. Appeal No. 2008-1795, Application No. 10/694,420 decided on April 30, 2008). We find that the issues of patentability are not the same. Thus, the prior decisions do not affect the outcome of the presently appealed claims.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's final rejection³ of claims 1-5, 11-16, and 23.⁴ We have jurisdiction under 35 U.S.C. § 6. We AFFIRM-IN-PART.

INTRODUCTION

Details of the appealed subject matter are recited in representative appealed claims 1, 11, and 23 of the present application, which are reproduced below from the Claims Appendix to the App. Br:

1. A method of making a nonwoven web, the method comprising:
 - a) providing a plurality of fibers;
 - b) subjecting the fibers to a pneumatic attenuation force in a drawing slot, the attenuation force imparting a velocity to the fibers;
 - c) reducing the velocity of the fibers in a diffusion chamber that is spaced from an exit of the drawing slot in a direction of travel of the plurality of fibers, the diffusion chamber being formed substantially between opposed diverging sidewalls;
 - d) *subjecting the fibers to an applied electrostatic charge before the fibers enter the diffusion chamber, wherein the electrostatic charge is applied by two or more oppositely directed electrostatic charging units with each charging unit including an emitter device and a target device such that at least one emitter device is configured on each side of the fibers so that an*

³ Office action mailed March 3, 2009 ("Final Rejection"; cited as "FR"). In the Advisory Action mailed on June 2, 2009, the Examiner withdrew the rejection of claims 1, 11, and 23 on the ground of nonstatutory obviousness-type double patent as being unpatentable over claims 1, 5, and 11 of U.S. Patent No. 7,488,441 B2.

⁴ Claims 6-10 and 17-22 are also pending, but have been withdrawn from consideration. See Appeal Brief filed on August 12, 2009 ("App. Br."), 2.

electrostatic charge is generated from opposite directions transverse to the direction of travel of the plurality of fibers; and thereafter

e) collecting the fibers into a web on a moving forming surface.11. A method of making a nonwoven web, the method comprising:

a) providing a plurality of fibers;

b) subjecting the fibers to a pneumatic attenuation force in a drawing slot, the attenuation force imparting a velocity to the fibers;

c) reducing the velocity of the fibers in a diffusion chamber, the diffusion chamber being formed substantially between opposed diverging sidewalls;

d) *subjecting the fibers to and charging the fibers with an applied electrostatic charge while the fibers are in the diffusion chamber, the electrostatic charge being applied by two or more oppositely directed electrostatic charging units wherein at least one electrostatic charging unit includes an emitter device located upon a first one of the diverging sidewalls and a target device located on the opposite diverging wall and a second electrostatic charging unit includes a target device on the first one of the diverging sidewalls and an emitter device on the opposite diverging sidewall so that electrostatic charge is generated from opposite directions between the diverging sidewalls with respect to the direction of travel of the plurality of fibers through the diversion chamber; and thereafter*

e) collecting the fibers into a web on a moving forming surface.

23. A method of making a nonwoven web, the method comprising:

a) providing a plurality of fibers;

b) subjecting the fibers to a pneumatic attenuation force in a drawing slot formed between opposed drawing slot sidewalls, the attenuation force imparting a velocity to the fibers;

c) *subjecting the fibers to an applied electrostatic charge, the electrostatic charge applied by an electrostatic charging unit located on one of the drawing slot sidewalls;*

d) reducing the velocity of the fibers in a diffusion chamber, the diffusion chamber being formed substantially between opposed diverging sidewalls; and thereafter

e) collecting the fibers into a web on a moving forming surface;

wherein the pneumatic attenuation force is provided by air consisting of attenuation air only entering the drawing slot from the drawing slot sidewall opposing the drawing slot sidewall upon which the electrostatic charging unit is located.

The following Examiner's rejections⁵ are before us on appeal:

(1) Claim 23 is rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

(2) Claims 1 and 3 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Haynes '071,⁶ Maggio '134,⁷ and Epstein.⁸

(3) Claim 2 is rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Haynes '071, Maggio'134, and Epstein, as applied to claim 1, further combined with Trimble.⁹

⁵ Examiner's Answer mailed on November 9, 2009 ("Ans.").

⁶ WO 02/052071 A2 to Brian D. Haynes et al., published on July 4, 2002.

⁷ WO 00/65134 to Rosario Maggio et al. published on November 2, 2000. Appellants do not challenge the Examiner's reliance on United States Patent No. 6,966,762 B1 (Maggio'762), issued to Rosario Maggio et al. on November 22, 2005, which is the national stage filing of Maggio'134, as the corresponding English language document. Our citation to Maggio '134 is to Maggio'762.

⁸ US 3,052,009, issued to Herman Epstein et al. on September 4, 1962.

⁹ WO 93/21370 to Lloyd E. Trimble et al. published on October 28, 1993.

(4) Claims 4 and 5 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Haynes ‘071, Maggio‘134, and Epstein, as applied to claim 1, further combined with Haynes‘379.¹⁰

(5) Claim 11 is rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Maggio‘381,¹¹ Haynes ‘071, and Epstein.

(6) Claims 11 and 15 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Schmit¹² and Epstein.

(7) Claim 13 is rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Maggio ‘381, Haynes ‘071, and Epstein, as applied to claim 11, further combined with Trimble.

¹⁰ United States Patent No. 6,117,379 issued to Bryan David Haynes et al. on September 12, 2000.

¹¹ French Published Patent Application No. 2,825,381 to Rossario Maggio published on December 6, 2002. Appellants do not challenge the Examiner’s reliance on United States Patent No. 6,974,316 B2 (Maggio ‘316), issued to Rosario Maggio on December 13, 2005, which is the United States filing date of Maggio‘381 as the corresponding English language document. Our citation to Maggio ‘381 is to Maggio’316.

¹² WO 02/34990 A1 to Laurent Schmit et al., published on May 2, 2002. Appellants do not challenge the Examiner’s reliance on United States Patent Application Publication No. 2004/0028763 A1 (Schmit‘763) to Laurent Schmit et al., published on Feb. 12, 2004, which is the national stage filing of Schmit as the corresponding English language document. Our citation to Schmit is to Schmit’763.

(8) Claim 13 is rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Schmit and Epstein, as applied to claim 11, further combined with Trimble.

(9) Claim 14 is rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Maggio ‘381, Haynes ‘071, and Epstein, as applied to claim 11, further combined with Haynes ‘379.

(10) Claims 14 and 16 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Schmit and Epstein, as applied to claim 11, further combined with Haynes ‘379.

(11) Claim 23 is rejected under 35 U.S.C. § 103(a) as being unpatentable over the combined teachings of Maggio ‘134 and Davis.¹³

(12) Claims 1, 11, and 23 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over Claim 1 of copending Application 10/687,006, which issued as U.S. Patent No. 7,504,060 B2 on Mar. 17, 2009.

DISCUSSION

35 U.S.C. § 112, first paragraph, Rejection (1)

The test for determining compliance with the written description requirement of 35 U.S.C. § 112, first paragraph, is whether the disclosure of

¹³ United States Patent No. 6,660,218 B2, issued to Michael C. Davis et al. on Dec. 9, 2003, filed on July 31, 2001.

an application, as originally filed, reasonably conveys to one of ordinary skill in the art that the inventor had possession at that time of the later claimed subject matter. *In re Kaslow*, 707 F.2d 1366, 1375 (Fed. Cir. 1983).

“[T]he invention claimed does not have to be described in *ipsis verbis* in order to satisfy the [written] description requirement of § 112.” *In re Lukach*, 442 F.2d 967, 969 (CCPA 1971). However, the description must be sufficiently clear that one of ordinary skill in the art would have recognized from the disclosure that the applicant invented the later claimed subject matter. *In re Wertheim*, 541 F.2d 257, 262 (CCPA 1976).

The Examiner finds that the originally filed specification does not provide an adequate written description as required under 35 U.S.C. § 112, first paragraph, for the limitation “wherein the pneumatic attenuation force is provided by air consisting of attenuation air only entering the drawing slot from the drawing slot sidewall opposing the drawing slot sidewall upon which the electrostatic charging unit is located” in claim 23. Ans. 4, 5. According to the Examiner, the description at p. 20, ll. 24 and 25, of the specification, which reads “utilizing attenuation air entering the fiber drawing unit only from the opposing sidewall of the attenuation chamber or fiber drawing slot,” is “limited to requiring that some air come from only the opposing sidewall.” Ans. 4. The Examiner finds further that “[e]ven if the specification is held to indicate only one sidewall providing attenuation air, the specification does not preclude any other source of attenuation air as claimed with the closed claim language of ‘consisting.’” *Id.*

Appellants argue that the Examiner’s comments “seem to ignore the fact that claim 23 speaks only of the attenuation air that provides the

pneumatic force to the fibers. The relevant language of claim 23 is ‘wherein the **pneumatic attenuation force** is provided by air consisting of * * *.’”

App. Br. 13. According to Appellants, originally filed claim 23, which constitutes part of the written description of the originally filed specification, recites “‘wherein the pneumatic attenuation force is provided by attenuation air entering the drawing slot **only** from the drawing slot sidewall opposing the drawing slot sidewall upon which the electrostatic charging unit is located.’” App. Br. 9, 10. Appellants argue that both originally filed claim 23 and present version of claim 23 recite that the attenuation air enters “only from” the drawing slot sidewall opposite to that having the electrostatic unit. App. Br. 10. Appellants argue that the “wherein clause” in present claim 23 “does not differ substantively from the original language in claim 23.” App. Br. 10.

We find that Appellants’ arguments are supported by the record. The Examiner has not demonstrated that the limitation “pneumatic attenuation force is provided by air consisting of attenuation air only entering the drawing slot from the drawing slot sidewall . . . ,” relates to a different invention than that described in the original disclosure referred to by Appellants. Thus, we determine that the preponderance of the evidence supports Appellants’ position that that disclosure as a whole, including claim 23, in the originally filed application relied upon by Appellants provides an adequate written description for the pneumatic attenuation force being “provided by air consisting of attenuation air only entering the drawing slot from the drawing slot sidewall . . .” recited in appealed claim 23.

Accordingly, we REVERSE Rejection (1).

Prior art Rejections under 35 U.S.C. § 103(a)

I. *Rejections (2) through (10)*

In Rejections (2) through (4), the Examiner finds that the Haynes ‘071, teaches a method for making a nonwoven web that comprises subjecting fibers to an applied electrostatic charge using an electrostatic charging unit **18** that comprises an oppositely directed emitter device **20** and a target device **22**. Ans. 5-6, and Haynes’071, Fig. 1 and Haynes’071, p. 12, ll. 14-21.

In Rejections (5), (7), and (9), the Examiner finds that Maggio’381 in view of Haynes’071 renders obvious a method for making a nonwoven web that comprises subjecting fibers to an applied electrostatic charge using an electrostatic charging unit that comprises an oppositely directed emitter device **20** and a target device **22**. Ans. 9, 10, citing Haynes’071, *id.* See also Maggio’316, Fig. 2 and col. 2, ll. 56-64.

In Rejections (6), (8), and (10), the Examiner finds that Schmit teaches a method for making a nonwoven web that comprises subjecting fibers to an applied electrostatic charge using an electrostatic charging unit that comprises an oppositely directed emitter device **11** and a target device **8**. Ans. 11, citing Schmit’763, Figs. 1 through 3 and paragraphs [0004], [0006], [0020], and [0021].

In each of Rejections (2) through (10), the Examiner acknowledges that neither Haynes ‘071, nor Maggio ‘381 in view of Haynes ‘071, nor Schmit, respectively, teaches or suggests applying the electrostatic charge using “two or more oppositely directed electrostatic charging units” where

each charging unit includes an emitter device and a target device as recited in appealed claims 1 or 11. Ans. 6, 10, and 11, respectively. To remedy the deficiencies in the rejections above, the Examiner finds that

Epstein teaches alternating the electrostatic charge from one side to another and back to the first side material (two or more oppositely directed electrostatic charging units such that at least one emitter device is configured on each side of the fibers so that an electrostatic charge is generated from opposite directions transverse to the direction of travel of the plurality of fibers)(see figs. 7 and 8), and further that the particular placement and arrangement of electrodes is familiar to the ordinary artisan (see col. 3, lines 39-44).

Ans. 6, 10, 11 and 12, respectively.

The Examiner then concludes that it would have been obvious for a person having ordinary skill in the art to incorporate the method of Epstein into the method of Haynes '071 in view of Maggio'134 "in order to provide the ability to vary the crimping to attain greater softness (Epstein, 3:3-6) into fabrics of Haynes '071" Ans. 6, 7. The Examiner also concludes that it would have been obvious for a person having ordinary skill in the art to incorporate the method of Epstein into the respective methods of Maggio '381 in view of Haynes '071 or Schmit "in order to provide the ability to vary the crimp to produce greater softness (Epstein, 3:3-6)." Ans. 10 and 11, and 12, respectively. Recognizing that Epstein's two or more oppositely directed electrostatic charging units do not employ target devices, the Examiner appears to rely on the target device and the emitter device of the Haynes '071 or the Schmit electrostatic charging unit to arrive at the methods recited in appealed claims 1 and 11. Ans.18, 20, and 21.

Appellants contend, *inter alia*, that a person having ordinary skill in the art would not have combined the teachings of Epstein with those of Haynes'071, Maggio '381 in view of Haynes '071, or Schmit in the manner suggested by the Examiner because the Epstein electrodes are used in a crimping process that is completely different from the target devices and the emitter devices used in the methods taught or suggested by Haynes '071, Maggio '381 in view of Haynes '071, or Schmit. App. Br. 17, 18, 27, 28, 30, 32.

Thus, the issue presented for appealed claims 1-5, 11, and 13-16: Has the Examiner reversibly erred in determining that a person having ordinary skill in the art would have been led to employ the two or more oppositely directed crimping electrodes taught by Epstein having the target device and the emitter of the Haynes '071 or the Schmit electrostatic charging unit in the methods taught or suggested by Haynes '071, Maggio '381 in view of Haynes '071, or Schmit to arrive at the methods recited in appealed claims 1 and 11? On this record, we answer this question in the affirmative.

As correctly argued by Appellants, the Epstein electrodes are not used for the same purpose, i.e., electrostatically charging fibers to make the individual fibers repel one another, as required by the methods taught or suggested by Haynes '071, Maggio '381 in view of Haynes '071, or Schmit. App. Br. 15, 17, 18, 27, 28, and 32 and Epstein, col. 3, ll. 31-38 and Haynes'071, p.1, ll. 15-17, Maggio'316, col. 1, ll. 29-36, and Schmit'763, paragraph [0004], respectively. The Epstein electrodes apply an electric field to a fiber that is already charged to attract the fiber in a particular direction to produce a crimp in the fiber in that direction. App. Br. 20

and 30 and Epstein, col.1, ll. 18-25. In particular, Epstein, col.1, ll. 18-25, teaches that the purpose of its invention “is to produce crimps along a continuously running strand or filament of synthetic fiber consisting substantially of electrically insulating thermoplastic material . . . exposing the filament intermittently at a repetition frequency . . . to an electromagnetic field pulse of predetermined intensity and duration.”

The Examiner has not shown that the Epstein electrodes perform a function equivalent to that of the electrostatic charging unit having the target device and emitter taught or suggested by either by Haynes ‘071, Maggio ‘381 in view of Haynes ‘071, or Schmit. Nor has the Examiner shown that the target device and the emitter device of the electrostatically charging unit taught or suggested by Haynes ‘071, Maggio ‘381 in view of Haynes ‘071, or Schmit are useful for the crimping purpose taught by Epstein. The additional references, such as Maggio ‘134, Trimble, or Haynes ‘379, referred to in Rejections (2) through (4) and (7) through (10) are not relied upon by the Examiner to correct the above deficiencies of Haynes ‘071, Maggio ‘381 in view of Haynes ‘071, or Schmit.

It follows that the Examiner has not established, by a preponderance of the evidence, that a person having ordinary skill in the art would have been led to employ the target device and the emitter device of the Haynes ‘071 or the Schmit electrostatic charging unit as the two or more oppositely directed crimping electrodes taught by Epstein to arrive at the methods recited in claim 1 or 11 within the meaning of 35 U.S.C. §103(a).

Accordingly, we REVERSE Rejections (2) through (10).

II. *Rejection (11)*

The Examiner finds that Maggio '134 teaches a method for making a nonwoven web that comprises

providing a plurality of fibers **F**, subjecting the fibers to an attenuation force in a drawing slot (at Fig. 3, Ref. No. 13), subjecting the fibers to a[n] electrostatic charging unit **11** located on the sidewall, reducing the velocity of the fibers in a diffusion chamber being formed substantially between opposed diverging sidewalls **15**, and collecting the fibers onto a web of a moving surface **7**.

Ans. 16, citing Maggio'762, Fig. 3; *see also* Maggio'762, col. 5, ll. 31-60.

Figure 3 of Maggio '134 also shows air entering the slot passage from openings in sidewalls of the Maggio'134 diffuser assembly, which are located on the same and opposite sides of electrostatic charging unit **11**. *See* Maggio'762, Fig. 3.

The Examiner acknowledges that Maggio '134 does not teach “providing [an] attenuation force by providing air consisting of attenuation air only entering the drawing slot from the drawing slot sidewall” opposite to the electrostatic charging unit, recited in appealed claim 23. *Id.*

The Examiner finds that “Davis teaches providing air from a single nozzle to direct filaments with one air nozzle (attenuation air only entering the drawing slot from one slot sidewall) (see col. 1, lines 37-51).” Ans. 17.

The Examiner concludes that it would have been obvious for a person having ordinary skill in the art to employ Davis's single attenuation air supply configuration, in lieu of the two air supply configuration taught by

Maggio '134, on one of the slot sidewalls (opposite to or same side as the location of the electrostatic charging unit) in the method taught by Maggio '134, with a reasonable expectation of successfully minimizing air usage and non-uniformity in the laydown process, while increasing filament tension.
Id.

Appellants contend that the collective teachings of Maggio'134 and Davis would not arrive at the method recited in appealed claim 23. Appellants argue that Maggio'134 does not disclose or suggest a drawing slot having an electrostatic charging unit on one sidewall of the drawing slot as recited in appealed claim 23. App. Br. 40, 41, citing Maggio'762, col. 5, ll. 31-47. Appellants further argue that the Davis's one nozzle is "an additional source of air to supply the pneumatic attenuation force," and that Davis uses its air nozzle in a diffuser portion, not in a drawing slot as recited in appealed claim 23. App. Br. 42, citing Davis, col. 1, ll. 37-51, and 43, citing Davis, col. 3, ll. 29-35, respectively.

Thus, the issue presented for appealed claim 23 is: Has the Examiner reversibly erred in determining that the collective teachings of Maggio'134 and Davis would have suggested the use of the single attenuation air supply taught by Davis as the sidewall slot passageway in the Maggio;'134 diffuser assembly to arrive at the method recited in appealed claim 23? On this record, we answer in the negative.

As shown in Fig. 3 of Maggio'134 diffuser assembly, the rectilinear slot **20** is formed between opposing sidewalls downstream from the filament inlet zone **13** and upstream from diffusing zone **15** defined by opposed

diverging sidewalls. *See* Maggio'762, Fig. 3, and col. 5, ll. 31-48. The diffusion zone **15** corresponds to the claimed diffusion chamber having "opposed diverging sidewalls" in appealed claim 23. The rectilinear slot **20** corresponds to the drawing slot "formed between opposed drawing slot sidewalls" prior to "a diffusion chamber . . ." recited in appealed claim 23. Thus, the Maggio '134 electrostatic charging unit **11** located on a sidewall of the rectilinear slot **20** meets the "electrostatic charging unit located on one of the drawing slot sidewalls" recited in appealed claim 23.

Although the Maggio'134 diffuser assembly has two openings, including one opening opposite to the electrostatic charging unit 11, for supplying air to the rectilinear slot **20**, Maggio'134 does not disclose providing "air consisting of attenuation air only entering the drawing slot from the drawing slot sidewall opposing the drawing slot sidewall upon which the electrostatic charging unit is located" as recited in appealed claim 23. However, as found by the Examiner, Davis not only teaches using *at least one* air nozzle, inclusive of the two air openings taught by Maggio'134, for directing high speed air onto the filaments in a downstream direction, but also illustrates a "filament drawn jet" only comprising a single angular air nozzle **32** for directing high speed air onto said filaments in a downstream direction. *See* abstract and Fig. 1. *See also* reference claim 2 of Davis, which recites that in the drawn jet recited in reference claim 1, from which reference claim 2 depends, "there is only one air nozzle." This feature, according to col. 1, ll. 23-51 and col. 2, ll. 40-54, minimizes air usage while increasing filament tension which is useful for drawing a smaller filament diameter with increased molecular alignment for increased

filament strength during the production of a nonwoven fabric. The teachings in Davis support the Examiner's finding at page 17 of the Answer that "Davis teaches providing [attenuation] air from a nozzle to direct filaments with one air nozzle" as recited in appealed claim 23, in lieu of the two openings taught by Maggio '134.

Given the above teachings, the Examiner has not reversibly erred in determining that one of ordinary skill in the art would have been led to employ Davis's single attenuation angular air supply opening in a sidewall of the slot passageway of the Maggio'134 diffuser assembly opposite to the sidewall having the electrostatic charging unit 11 as recited in appealed claim 23, with a reasonable expectation of successfully providing attenuation air useful for producing a nonwoven fabric. On this record, Appellants have not demonstrated that the Davis's single attenuation angular air supply, unlike Maggio '134's two air supplies, would not be suitable or useful for producing a nonwoven fabric in the method taught by Maggio '134.

In reaching this determination, we note Appellants' argument that Davis does not employ its single attenuation angular air supply opening in the rectilinear slot of the type taught by Maggio'134. App. Br. 43, citing Davis, col. 3, ll. 29-35. However, in Davis's description of the drawing slot at col. 1, ll. 37-51, Davis does not require that the drawing slot has a divergent wall as argued by Appellants. Davis's drawing slot with the one divergent wall shown in the Davis Fig. 1 is another embodiment of the Davis drawing slot. Col. 6, ll. 11-13, of Davis teaches "a drawing passageway

with a divergence angle between gap walls of *about 0.0* to about 5 degrees [emphasis added],” which is inclusive of the rectilinear slot of the type taught by Maggio’134.

Accordingly, we AFFIRM Rejection (11).

Obviousness-type Double Patenting Rejection

As noted in the Examiner’s Answer, p. 3, the provisional rejection of claims 1, 11, and 23 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1 of copending Application No. 10/687,006 in the Final Rejection, mailed on March 3, 2009, p. 4, has not been withdrawn by the Examiner. Appellants have not presented the rejection for review in their Brief filed on August 12, 2009. However, according to 37 C.F.R. §41.31(c), “[a]n appeal, when taken, must be taken from the rejection of all claims under rejection which the applicant or owner proposes to contest.” Because Appellants did not present any arguments regarding that rejection, we summarily AFFIRM the rejection of claims 1, 11, and 23 on the ground of nonstatutory obviousness-type double patenting as unpatentable over claim 1 of copending Application No. 10/687,006 (now U.S. Patent No. 7,504,060 B2).

For the first time in the appeal, Appellants argue in the Reply Brief (“Reply Br.”) filed on March 8, 2010 that claim 1 of copending Application 10/687,006 (now U.S. Patent No. 7,504,060 B2) fails to suggest to the person having ordinary skill in the art the methods

recited in appealed claims 1, 11, and 23. Reply Br 3. That argument, however, is not timely presented. Any argument not presented in the Appeal Brief will not be considered, when filed in a Reply Brief, absent a showing of good cause explaining why the argument could not have been presented in the Appeal Brief. *See Ex parte Borden*, 93 USPQ2d 1473, 1474 (BPAI 2010) (informative) (“the reply brief [is not] an opportunity to make arguments that could have been made in the principal brief on appeal to rebut the Examiner’s rejections, but were not.”); *cf. Optivus Tech., Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978, 989 (Fed. Cir. 2006) (argument raised for the first time in the Reply Brief is considered waived). Appellants have not demonstrated, much less alleged, any good cause for the belated argument.

Accordingly, we AFFIRM Rejection (12).

ORDER

We REVERSE REJECTION (1) of claim 23 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

We REVERSE REJECTIONS (2) through (10) of claims 1 through 5, 11, and 13 through 16 under 35 U.S.C. § 103(a) as being unpatentable over combined teachings of the cited prior art.

We AFFIRM REJECTION (11) of claim 23 under 35 U.S.C. § 103(a) as being unpatentable over combined teachings of Maggio ‘134 and Davis.

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Application 10/694,153

We summarily AFFIRM REJECTION (12) of claims 1, 11, and 23 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1 of copending Application 10/687,006, which issued as U.S. Patent No. 7,504,060 B2 on Mar. 17, 2009, as set forth in the Examiner's Final Office Action, mailed on March 3, 2009, p. 4.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED-IN-PART

kmm